



Atty Gen. Op. No. 10 - IB15

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November 17, 2010

Jason Levine  
Sports Editor  
The News Journal  
P.O. Box 15505  
Wilmington, DE 19720

Dear Mr. Levine,

On November 12, 2010 you sent a letter to the Attorney General "formally challeng[ing] the legality of a Delaware Interscholastic Athletic Association Special Board Meeting held November 11, 2010 at the Collette Building in Dover." We appreciate your concerns regarding whether that meeting was held consistent with the open meetings provisions of the *Freedom of Information Act*, 29 Del. C. ch. 100 ("FOIA"). We have reviewed your letter and have received a response from the Delaware Interscholastic Athletic Association's ("DIAA"). I have reached the following conclusions.

First, your letter contends that DIAA failed to give public notice of its November 11, 2010 special meeting until the day of the meeting, in violation of 29 Del. C. § 10004(e)(3). Section 10004(e)(3) mandates that public bodies, such as DIAA, "give public notice of . . . any special or rescheduled meeting as soon as reasonably possible, but in any event no later than 24 hours before such meeting." The notice announcing the pending meeting posted on the state website incorrectly states it was being posted on

November 11, 2010—the day of the meeting. However, DIAA has advised us that the notice actually was posted at the building and on the state's website one day earlier, on November 10, 2010. The State of Delaware Department of Technology and Information has confirmed that the notice was in fact posted on the state website before 9:00 a.m. on November 10 —24 hours before the meeting and therefore in compliance with FOIA's 24 hour requirement. The posting date listed on DIAA's notice is incorrect, which understandably created confusion.

Next, your letter states that the DIAA's public notice of its November 11, 2010 special meeting "provided no reasonable explanation for the need to conduct an emergency meeting as required by [Section] 10004(e)(3)." Section 10004(e)(3) requires "[t]he public notice of a special or rescheduled meeting...include an explanation as to why [a seven-day] notice...could not be given."

Here, the DIAA's notice and agenda contains but one "action item:" the "Self-Report by Red Lion Christian Academy and DIAA Investigation." It goes on to state that "this agenda of the Special Meeting of DIAA was filed less than seven (7) days in advance of the meeting as . . . items [necessarily concerning the DIAA investigation of Red Lion Christian Academy and its self-report] were brought to the Board's attention [that] need[ed] immediate attention before the next regular scheduled Board meeting."<sup>1</sup> Clearly, then, DIAA did provide "an explanation" for why it was holding the meeting on 24 hours' notice.

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<sup>1</sup> The agenda goes on to say that, during the meeting, the Board might need to enter executive session "to consider strategy with respect to pending or potential litigation [necessarily concerning the DIAA investigation of Red Lion Christian Academy and its self-report]." It is important to note DIAA did not at any time enter into executive session and the entire meeting was held in open public session.

We know from DIAA's response to us that the meeting was necessary to approve a settlement of a dispute between DIAA and Red Lion Christian School that included a provision that Red Lion would withdraw from the state football tournament. That issue was time sensitive because the state football tournament school selections were due to be announced shortly and Red Lion's participation or withdrawal would have mattered.

We have no difficulty agreeing that, as thus explained, the meeting was indeed necessitated by circumstances. Had the meeting notice specifically provided this explanation, there would be little need for further discussion. But it did not. The question becomes: how much "explanation" is necessary under the statute?

We have previously addressed the sufficiency of a public body's explanation for the need to conduct a special meeting. We have stated, "To notice a special meeting, FOIA 'requires only a reason, not a specific detailed factual basis, why the seven-day requirement could not be met.'" *Del. Op. Att'y Gen.* 03-IB16 (Aug. 08, 2003) (quoting *Del. Op. Att'y Gen.* 94-IO37 (Jul. 26, 1994)); see also *Del. Op. Att'y Gen.* 96-IB15 (May 10, 1996) (finding that the notice lacked "any explanation" why the 7 day requirement was not met). In *Del. Op. Att'y Gen.* 01-IB02 (Jan. 30, 2001), we advised that a public body's agenda stating that it was holding a special meeting in order to receive legal advice from the Town Solicitor was sufficient to satisfy § 10004(e)(3). In *Del. Op. Att'y Gen.* 03-IB05 (Feb. 5, 2003), we reviewed and determined sufficient a notice that stated "[t]his meeting is being held with less than 7 days notice because of need to meet potential litigation issues; only time a quorum could be gathered in a timely manner."

Here, we cannot help but note that much of the “explanation” is little more than boilerplate language that could be added to any meeting notice to justify a shortened advance notice to the public. Is that sufficient? Were we writing on a blank slate, we would likely say “no.” But our previous Opinions have paid scant attention to the sufficiency of the “explanation” and appear to have approved any explanation in the notice, “reasonable” or otherwise. Given these precedents, I am not convinced that we ought to nullify the explanation provided by DIAA here, unsatisfying though I may find it.

Having said all this, it follows that the News Journal’s point is well-taken. Greater detail in the meeting notice would be more meaningful to a public trying to determine if the shortened meeting notice was, indeed, appropriate under the circumstances. While we will not hold DIAA to a stricter standard than we have applied to others in the past, we recommend either a statutory change or adoption of a uniform standard among state agencies requiring the notice to include enough specific information in the notice for the public to determine if the amount of notice was reasonable. I have directed our State Solicitor to undertake just such a task today.

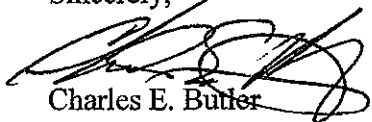
Finally, your letter also states that “[t]he minutes of the Nov. 11 meeting have not been posted publicly as is required by the law.” “Public bodies are required by law to prepare minutes of their meetings in a timely fashion, consistent with the purposes of FOIA.” *Del. Op. Att’y Gen.* 98-IB01 (Jan. 21, 1998). We have determined “that a reasonable time [to post minutes of a public meeting] is by the time of the public body’s next regularly scheduled meeting.” *Del. Op. Att’y Gen.* 03-IB05 (Feb. 5, 2003). You

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requested the minutes only one day after the meeting. It is neither unreasonable nor a violation of FOIA that DIAA has not yet posted minutes of that meeting.

In conclusion, DIAA did not violate FOIA by the timing of posting the notice, by its explanation for why it was holding a special meeting, or by failing to post meeting minutes before its next regularly scheduled meeting. We join in your concern that the explanation for dispensing with the 7 day notice requirement was not ideal, but it was consistent with the statutory requirement and our own precedent. We will seek to strengthen the FOIA law through more clearly defined requirements for explaining the shortened notice when it is needed by the public body.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles E. Butler", written over a horizontal line.

Charles E. Butler  
Chief Deputy Attorney General

Cc: Kevin Charles, Executive Director, DIAA